No. 82-6935

JUL 29 1983

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSEPH PATRICK PAYNE, SR.,

PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO

THE SUPREME COURT OF VIRGINIA

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QUESTION PRESENTED FOR REVIEW

1. Whether Petitioner's conviction of willful, deliberate and premeditated killing in the commission of robbery while armed with a deadly weapon, barred his subsequent prosecution for robbery.

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The respondent, the Commonwealth of Virginia, respectfully prays that petitioner's request that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia, entered on April 14, 1983, be denied.

The respondent concurs in the representations of the petitioner's petition concerning the Opinion Below, Jurisdiction, Constitutional Provision Involved and Statement of the Case, as provided in Rules 22.1 and 34.2 of this Court.

ARGUMENT IN OPPOSITION TO WRIT OF CERTIORARI

Your petitioner has raised this appeal to this Honorable Court on the allegations that he has been placed in jeopardy twice for the same offense, in violation of the Fifth Amendment to the United States Constitution. The constitutional guarantee against double jeopardy affords protection in three circumstances: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense.

North Carolina v. Pearce, 395 US 711, 717, 23 LEd 2d 656,89 SCt 2072 (1969). Only the second of these protections is applicable to this appeal and your respondent therewith submits that this Court has established a clear definition of the law on this aspect of double jeopardy.

The established test for determining whether two offenses are distinctly separate or are the same offense (or one offense is a lesser-included offense of the greater offense) was stated in Blockburger v. United States, 284 US 299, 304, 76 LEd 2d 306, 52 SCt 180 (1932):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not ...

cited in Brown, supra, 432 US at 166, 53 LEd 2d at 194. In applying this test, this Court has ruled that the two offenses must be viewed in the abstract rather than with reference to the particular facts of the case. Whalen v. United States, 445 US 684, 694 n.8,63 LEd 2d 715, 725 n.8, 100 SCt 1432 (1980). The Supreme Court of Virginia has incorporated this abstract analysis approach to the Blockburger test in Blythe v. Commonwealth, 222 Va 722, 284 SE 2d 796, 798 (1981). Viewing the capital murder statute of the Code of Virginia in the abstract, there are seven distinct alternatives to establishing capital murder, one of which is "the willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon." Section 18.2-31, 1950 Code of Virginia, as amended. Under this analysis, there is no requirement that the murder charge be proven specifically by robbery with a deadly weapon; there are six other abstract possibilities within the same statutory offense. Similarly, the robbery charge does not require proof of the victim's death. Thus, we have two offenses, each of which requires proof of an element of an offense which the other does not, regardless of the facts of the case.

The abstract analysis approach of Whalen and Blythe is cited in at least two recent opinions of the Fourth Circuit of the United States Court of Appeals. In United States v. Lurz, et.al., 666 F 2d 69, 74 (4th Cir. 1981), the Fourth Circuit ruled by abstract analysis that two federal drug trafficking statutes were not the same offense:

> We are satisfied that the determination that there were two independent conspiracies was not clearly erroneous. Preparation and distribution could, of course, be part of a single integrated operation. Viewed as an abstraction, it is no less likely, however, that a principal in the operation, here Lurz, could limit the distribution ring participants to disposition of PCP, while making other arrangements with other persons independent of the distributors for acquisition of PCP...(Emphasis in original). Id. at 74, cert. denied, 455 US 1005.

More recently, the Fourth Circuit affirmed the U.S. District Court for the Eastern District of Virginia in an unpublished opinion, Barbee v. Mitchell, No. 81-6690 (4th Cir. 1982) in which the Blythe approach to the abstract analysis of the Blockburger test was wholly adopted.

Respondent would also argue that the abstract analysis of the statutes of the Code of Virginia by the Supreme Court of Virginia is incumbent upon this Court. A state's highest court has "the final authority to interpret...that state's legislation." Brown v. Ohio, 432 US at 167, 53 LEd 2d at 195; Garner v. Louisiana, 368 US 157, 169, 7 LEd 2d 207, 82 SCt 248 (1961). Additionally, where one offense is created by statute and the other is created by codifying a common law definition, the Blockburger test is inapposite. The initial inquiry of the Blockburger test requires a comparison of two statutory offenses. While capital murder, Section 18.2-31, is an offense created by statute alone, robbery has been ruled by the Supreme Court of Virginia as a common-law offense whose definition has simply been codified into the statute of the Commonwealth. Blythe, supra, 284 SE 2d at 797; Whitley v. Commonwealth, 223 Va. 66, 73 (1983); Jones v. Commonwealth, 218 Va. 18, 21 (1977); Jones v. Commonwealth, 172 Va. 615, 618 (1939).

Without surmounting this threshold issue of the Blockburger test, it is clear that capital murder and robbery are two distinct offenses in Virginia for double jeopardy purposes and do not require the Blockburger test to arrive at that conclusion. Both within and without the Blockburger test, the Virginia Supreme Court has ruled as to the substantive interpretation of its own statutes and those opinions are binding on this Court.

Apart from the Blockburger test, this Court has opined as to the point of departure with which successive prosecutions should be regarded:

> Unless it is plain that two offenses are "the same" for double jeopardy purposes, the parties and the court should be entitled to assume that successive prosecutions are an available option ... [The defendant] ... was simply under an obligation to preserve his double jeopardy point properly, by alerting both court and prosecution to the existence of a complex, unsettled issue.
>
> Jeffers v. United States, 432 US 137, 150 n.15, 53 LEd 2d 168, 179 n.15, 97 SCt 2207, reh'g denied, 434 U.S. 880, 54 LEd 2d 164 (1977).

Here, it is obvious that the burden is on the defendant to raise any double jeopardy issues; absent any objections, successive prosecutions are not barred and a claim of double jeopardy does not validly lie. According to the decisions presented here, it is not plain that capital murder and robbery are "the same" for double jeopardy purposes and thus the trial court below and the Supreme Court of Virginia did not err in permitting the prosecution of the robbery charge subsequent to the capital murder conviction.

Petitioner's argument places reliance upon Harris v. Oklahoma, 433 US 682, 53 LEd 2d 1054, 97 SCt 2912 (1977). However, due to the abstract analysis of the Blockburger test required by the foregoing case decisions, it cannot be said that robbery is the same as, or a lesser-included offense of, capital murder as argued in petitioner's petition at page 3. Thus, Harris does not achieve the status of controlling authority and reliance thereon is misplaced; the successive prosecution for robbery

is not barred. In accord with argument above, the Supreme Court of Virginia, the Fourth Circuit Court of Appeals and this Honorable Court have uniformly ruled that abstract analysis is a required element of determining whether two offenses are the same or one is a lesser and included offense of the other. These decisions consistently argue that the double jeopardy protections of the Fifth Amendment have not been violated here.

WHEREFORE, the Commonwealth of Virginia respectfully prays that petitioner's petition for writ of certiorari not be reviewed, as the decision below is consistent with considered opinions of this Honorable Court.

Respectfully submitted,
Commonwealth of Virginia

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PROOF OF SERVICE

STATE OF VIRGINIA

COUNTY OF PRINCE WILLIAM, to-wit:

William M. Ryland, after being duly sworn, deposes and says that pursuant to Rule 28 of this Court he served the within Brief in Opposition to Writ of Certiorari to the Supreme Court of Virginia on counsel for the Petitioner by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

Alan Shacter
Counsel for Petitioner
10561 Crestwood Drive
Manassas, Virginia 22110

Paul F. Gluchowski
Counsel for Petitioner
9263 Church Street
Manassas, Virginia 22110

and depositing same in the United States mails at Manassas, Virginia on July 29, 1983.

William M. Ryland

William M. Ryland, AFFIANT

Subscribed and sworn to before me this 29th day of July, 1983.

Donna Oliver

Notary Public in and for the said County and State

My Commission Expires 1/17/87